No. 5495

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Teresa Casella, *Appellant,* vs. John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, California, *Appellee.*	}

BRIEF FOR APPELLANT.

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Subject Index

	Page
Argument	7
Conclusion	18
Contentions of appellant	6
I. That there is no substantial legal evidence in the record to sustain the charges against appellant for the following particular reasons:	
(1) The ex parte unsworn letter of inspectors Phelan and Farrelly is inadmissible	7
(2) The preliminary statement by appellant proved nothing against her with reference to the issues and is inadmissible	10
(3) The oral testimony given at the hearing does not sustain the charges against appellant	11
II. That the proceedings before the immigration authorities were manifestly unfair and that there was a manifest abuse of the authority committed to them by law in each of the following particulars:	
(1) The warrant on which appellant was arrested and tried did not apprise appellant of the charges against her	13
(2) At the hearing of the appellant the presiding inspector introduced into the record a letter signed by inspectors Phelan and Farrelly on February 26, including a statement taken from appellant on the same date, whereas the record now discloses a letter written by these inspectors and a statement taken from the alien on a different date, to wit, February 25th.	16
(3) The immigation inspector who presided at appellant's hearing at San Francisco justified his recommendation for deportation in part upon matter entirely foreign to the issues	17
(4) The Washington Board of Review's recommendation to the Secretary of Labor that appellant be deported is based in part upon a statement that has no foundation in the record and in part upon matter not within the issues.	17

Table of Authorities Cited

Pages

Ex parte Avakian, 188 Fed. 688........................ 17
Ex parte Garcia, 205 Fed. 56.......................... 18
Ex parte Keisuki Sata, 215 Fed. 173................... 15
Ex parte Nogata. 11 Fed. (2d) 178..................... 15
Ex parte Thorvumulopalo v. U. S., 3 Fed. (2d) 803..... 15

Hughes v. Tropello, 296 Fed. 306...................... 13

Kwock Jan Fat v. White, 253 U. S. 454................. 17

Mouratis v. Nagle, 24 Fed. (2d) 799................... 9

U. S. v. Louise Lee, 184 Fed. 651..................... 13
U. S. v. Hung Chang, 126 Fed. 400..................... 13
Ungar v. Seaman, 4 Fed. (2d) 80....................... 10
U. S. v. Tod, 263 U. S. 149........................... 13

Whitfield v. Hanges, 222 Fed. 754....................9, 15, 18

Yip Wah v. Nagle, 7 Fed. (2d) 426..................... 8

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Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the order of the District Court for the Northern District of California sustaining the demurrer to a petition for a writ of habeas corpus and dismissing the petition.

The proceeding arose in the District Court by Mary E. Fuella, presenting in behalf of her mother, the appellant, a petition for a writ of habeas corpus praying for her release from the custody of appellee as Commissioner of Immigration for the Port of San Francisco (Tr. of R. pp. 3 to 13). An order was issued directing the appellee to appear and show cause why a writ of habeas corpus should not be issued as

prayed for (Tr. of R. p. 13). The appellee responded by filing a general demurrer to the petition (Tr. of R. pp. 14 and 15). At the hearing upon the demurrer it was stipulated that the immigration records and proceedings, the same which are before this court as exhibits by order of the District Court, be considered as part of the petition. The demurrer was thereafter sustained, and the petition for a writ of habeas corpus was dismissed (Tr. of R. p. 16).

FACTS OF THE CASE.

The appellant, a widow, native of Italy, of the present age of 42 years, has resided in the United States since July, 1919, when she lawfully entered the country at Vancouver, British Columbia. She is the mother of four children, two of whom died in British Columbia. Of the two remaining children, one is the petitioner in behalf of appellant for the writ of habeas corpus herein (Tr. of R. p. 3); the other child of appellant resides in Nanaimo, British Columbia, where appellant lived before coming to the United States. Appellant's husband was killed in a mine disaster several years prior to appellant coming to the United States. Her husband was a British subject by naturalization (Exhibit A, p. 13), but appellant has lost her residence there on account of having resided in the United States since 1919, hence the direction in the warrant of deportation (Exhibit A, p. 34) that she be returned to Italy, which country she has been away from continuously for over 25 years (Exhibit A, p. 14).

Appellant was arrested under a warrant issued by the Department of Labor on February 28th, 1927 (Exhibit A, p. 23), wherein it is alleged that appellant "has been found in the United States in violation of the Immigration Act of February 5th, 1917, for the following among other reasons: That she has been found managing a house of prostitution or music or dance hall, or other place of amusement, or resort, habitually frequented by prostitutes".

Appellant was accorded a hearing on said warrant by the immigration authorities at San Francisco on April 20th, 1927, at which the examining immigration inspector, introducing the Immigration Department's own evidence, had incorporated in the record a certain alleged statement taken from the appellant on February 26th, 1927, also a certain statement made by inspectors Phelan and Farrelly on February 26th, 1927 (Exhibit A, p. 16). (The court cannot be referred to the statements supposed to have been taken and made on February 26th because they nowhere appear in the record.) The record, however, does contain an alleged statement taken from the appellant on an entirely different date, to-wit, February 25th, 1927 (Exhibit A, p. 4), and a statement alleged to have been made by inspectors Phelan and Farrelly on a different date than the one referred to by the examining inspector at the hearing (Exhibit A, p. 16), to-wit, a statement alleged to have been made by said inspectors the day before, i. e., February 25th, 1927 (Exhibit A, p. 5).

Thereafter, at the hearing, inspectors Phelan and Farrelly were cross-examined by appellant's attorney.

Inspector Phelan testified (Exhibit A, p. 16) that he and inspector Farrelly visited the appellant's lodging house at Sacramento, California, on February 25th, 1927, and says:

"We walked up the stairs and this lady (meaning the appellant) met us, and after informal conversation, the details of which I do not now recall, the alien invited us into a room which opened off the hall; we talked in there for some time casually and then the alien asked us which of us desired to take on a girl first; I believe that we asked her if she had two girls and the answer was 'No, only one'. I volunteered to take on the girl first and the girl, who later gave the name of 'Young', was called in by the alien, and I accompanied her to another bedroom which opened off the corridor."

Inspector Phelan does not give one word of testimony as to what was said or done after he accompanied the Young woman to the other room, but continues his testimony by stating that the Young woman denied giving the appellant any ill gotten gains, but, on the other hand, had stated that she paid the appellant a dollar a day for her room. Inspector Phelan further testifies that the appellant did not offer to commit an act of prostitution; that the Young woman had stated that she had resided at appellant's place about two days; and that no act of prostitution was committed.

The testimony of inspector Farrelly (Exhibit A, p. 15), so far as it relates to the charge against appellant, is as follows, in substance: that he visited

appellant's lodging house accompanied by inspector Phelan on February 25th, 1927; that he saw the appellant there; that he and inspector Phelan had seen the alien two months prior and that she stated that she did not have a girl there; that on the second visit he and Phelan went into appellant's place; that appellant did not offer to commit an act of prostitution with either of them; that he saw Marcelle Young there at the time; that he had no conversation with the Young woman about committing an act of prostitution; that the Young woman had been at appellant's place about two days; and that he knew nothing further than what he had learned on these two visits.

There is no record of the inspectors taking any statement from Marcelle Young, the alleged prostitute, at any time, and she was not produced by the inspectors at the hearing.

The appellant testified (Exhibit A, pp. 15 and 14) that she was not committing acts of prostitution at her lodging house at Sacramento on February 25th, 1927; that she recognized the two inspectors; that Marcelle Young had never paid her any money obtained from practicing prostitution; that the Young woman had been at the lodging house for only two days before the inspectors came; that the Young woman was supposed to pay her $4 per week for her room, but had paid nothing yet; and that her lodging house was not a house of prostitution on February 25th, 1927.

Thereafter inspector T. E. Borden, who presided at the hearing, prepared his report of the proceed-

ings and recommended the deportation of the appellant on the grounds charged (Exhibit A, p. 11). The Board of Review of the Immigration Service at Washington upheld the recommendation to deport appellant, holding in its opinion (Exhibit A, p. 20) that the charges against appellant had been sustained. Thereafter W. N. Smelzer, Assistant Secretary of Labor, issued a warrant directing the deportation of appellant (Exhibit A, p. 34).

CONTENTIONS OF APPELLANT.

The contentions of appellant are:

I. That there is no substantial legal evidence in the record to sustain the charges against appellant for the following particular reasons:

(1) The ex parte unsworn letter of inspectors Phelan and Farrelly is inadmissible.

(2) The preliminary statement by appellant proves nothing against her with reference to the issues and is inadmissible.

(3) The oral testimony given at the hearing does not sustain the charges against appellant.

II. That the proceedings before the immigration authorities were manifestly unfair and that there was a manifest abuse of the authority committed to them by law in each of the following particulars:

(1) The warrant on which appellant was arrested and tried did not apprise appellant of the charges against her.

(2) At the hearing of the appellant the presiding inspector introduced into the record a letter signed by inspectors Phelan and Farrelly on February 26th, including a statement taken from appellant on the same date, whereas the record now discloses a letter written by these inspectors and a statement taken from the alien on a different date, to-wit, February 25th.

(3) The immigration inspector who presided at appellant's hearing at San Francisco justified his recommendation for deportation in part upon matter entirely foreign to the issues.

(4) The Washington Board of Reviews' recommendation to the Secretary of Labor that appellant be deported is based in part upon a statement that has no foundation in the record and in part upon matter not within the issues.

ARGUMENT.

I. THERE IS NO SUBSTANTIAL LEGAL EVIDENCE IN THE RECORD TO SUSTAIN THE CHARGE AGAINST APPELLANT.

(1) At appellant's hearing the presiding inspector, introducing the Government's own evidence, introduced a letter signed by inspectors Phelan and Farrelly dated "February 26, 1927", but a letter bearing a different date, that is, "February 25, 1927", is found in the record (Exhibit A, p. 5) and is as follows:

"Feb. 25, 1927.

Commissioner of Immigration,
Angel Island Station,
San Francisco, Calif.

Today we called the Chico Rooms in Sacramento and were met at the head of the stairs by a woman, whom we afterwards learned was the alien Teresa Casella. This woman took us into a room and after some conversation asked us if we wanted a girl. She stated that she had only one girl. We asked her to bring in the girl, which she did, and after some further conversation the alien asked us which one wished to take the girl on first. Inspector Phelan then took this girl, who later gave her name as Marcelle Young, into another room where she made preparations to commit an act of prostitution with him, naming a price of two dollars for an act. We then disclosed our identity and secured the inclosed statement from the alien.

ARTHUR J. PHELAN,
Arthur J. Phelan, Immigrant Inspector.
PATRICK J. FARRELLY,
Patrick J. Farrelly, Immigrant Inspector."

The foregoing letter, even though the one the presiding inspector had in mind when he "incorporated and made a part of the record report of immigrant inspectors Phelan and Farrally dated February 26, 1927", may have furnished a basis for the issuance of the warrant but was inadmissible at the hearing, it being an ex parte unsworn statement. The only damaging particulars of this letter relate to what was said or done by the Young woman after she was accompanied into "another room" by inspector Phelan and therefore is not admissible in evidence.

In *Yip Wah v. Nagle,* 7 Fed. (2d) 426, which involved similar elements to the present case, it is said by this court:

> "It was also improper to permit Farrelly to testify as to what Betty Hoffman (outside the presence of petitioner) had said to him. The statements so received were very damaging and having been made in appellant's absence, they were not evidence proper to be considered against him."

In the case of *Mouratis v. Nagle,* 24 Fed. (2d) 799, at p. 801, this court, passing upon a case involving similar elements to the present one, said:

> "We refer to these circumstances, not for the purpose of determining the creditability of witness or of resolving the weight of conflicting evidence but as emphasizing the legal impropriety of basing a vital finding of fact upon an answer in the nature of an assumption or conclusion, given to an incompetent ex parte question."

In *Whitfield v. Hanges,* 222 Fed. 754, cited by the court in *Yip Wah v. Nagle,* supra, the Circuit Court of Appeals says, with reference to the inadmissibility of ex parte preliminary statements:

> "The information gathered under the provisions of Section 12 (like the information gathered by the inspectors before the arrest) may be used as a basis for instituting prosecutions for violation of the law, and for many other purposes, but it is not available as such, in cases where the party is entitled to a hearing."

The letter quoted above shows upon its face that inspector Farrelly had no knowledge of what was said or done by inspector Phelan and the Young woman. It is surprising that a federal officer would sign a letter such as this containing statements that he personally knew absolutely nothing about.

(2) The record shows that the inspector who presided at the hearing introduced in the record a statement claimed to have been taken from appellant on February 26th, 1927 (Exhibit A, p. 16). The record, however, discloses a statement alleged to have been taken February 25th, 1927, and even if this one (Exhibit A, p. 4) was the statement intended to be introduced, it was inadmissible at the hearing. The Circuit Court, in passing on a similar proposition, said in *Ungar v. Seaman,* 4 Fed. (2d) 80, at page 84:

> "The facts that these aliens were arrested and immediately questioned by the arresting officer while they were in custody, without notice by the charges in the warrants of arrest or otherwise of the simple charge against them, without counsel, and without time or opportunity, before they were interrogated upon the merits of their cases, to prepare to meet the real charges against them, violated the basic requirements of due process and a fair hearing that the accused shall be notified of the charge against him before he shall be required to answer or commit himself upon the merits of his case."

Furthermore, the purported statement of the alien taken February 25th, 1927, contains no statement bearing upon the charge against the alien. Her alleged admission that she had "sported" in Alaska, which, if done at all, was done before coming to the United States some thirteen of fourteen years ago, could not, under any possible construction, be considered to relate to the charge against her "that she had been found managing a house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes". If appellant

had been charged with being a person unfit to remain in the United States on account of acts committed prior to coming to this country and there had been introduced competent evidence to show this, this alleged admission about what she did in Alaska may have been admissible, but the charge against her is not broad enough to cover this ground, although the immigration officers attempted, as will be pointed out, to make the warrant so broad that she might be deported upon any ground which the authorities might decide on subsequent to her arrest.

(3) With the unsworn ex parte letter quoted above eliminated from the record and the alleged statement taken from appellant discarded for showing nothing within the issue, the oral testimony given at the hearing is absolutely insufficient to substantiate the charges against the appellant. While inspector Phelan testified (Exhibit A, p. 16) that appellant asked him and inspector Farrelly "which of us desired to take on a girl first", and called the Young woman and that he "volunteered" and accompanied the woman to another room, his testimony ending as it does, without disclosing what, if anything, was subsequently said or done by the Young woman to indicate that she was a prostitute, has no probative force relative to the charges. Yet inspector Phelan, after being sworn at the hearing, had been given the widest possible latitude to testify by appellant's attorney, who asked him (Exhibit A, p. 16): "Just state what happened when you went into the rooming house." Neither inspector under oath testified that the Young

woman agreed to commit an act of prostitution with them or that she set a price for such an act. Neither testified that she made preparations to commit such an act. Neither of them testified that the Young woman admitted being a prostitute or ever having committed an act of prostitution whatever. Neither of them testified that the Young woman had a reputation as a prostitute. On the other hand, Phelan did testify that the Young woman denied giving appellant any ill gotten gains, but was paying appellant the modest sum of a dollar a day for her room and that she had been there only two days.

Inspector Farrelly testified to absolutely nothing that proves the charges against appellant. He was asked at the hearing (Exhibit A, p. 15):

> "Q. There was a girl in the place?
> A. Yes, I saw one girl there.
> Q. Her name was Marcelle Young?
> A. Yes.
> Q. Did you ever have any conversation with this girl about committing an act of prostitution?
> A. No."

Both inspectors admitted that appellant did not offer to commit an act of prostitution with them. Neither inspector testified that appellant's place had a reputation as a house of prostitution, music or dance hall or other place of amusement where prostitutes gathered. On the other hand, the appellant positively testified that the place was not a house of prostitution.

It is significant that a statement was not taken from the Young woman, the alleged prostitute, by the

inspectors or she produced at the hearing. The inspectors apparently felt that she could not serve their purpose and that it would be better to leave the matter of making statements and giving testimony in their hands. This omission on their part and their subsequent failure to establish, or attempt to establish, by oral testimony, the charges, is fatal to their case because the burden of proof in a deportation proceeding rests with the Government.

Hughes v. Tropello, 296 Fed. 306;
U. S. v. Tod, 263 U. S. 149;
68 L. Ed. 221;
U. S. v. Louise Lee, 184 Fed 651;
U. S. v. Hung Chang, 126 Fed. 400.

II. THAT THE PROCEEDINGS BEFORE THE IMMIGRATION AUTHORITIES WERE MANIFESTLY UNFAIR AND THAT THERE WAS A MANIFEST ABUSE OF THE AUTHORITY COMMITTED TO THEM BY LAW.

(1) The warrant (Exhibit A, p. 23) gives as basis for the arrest of appellant: "She has been found in the United States in violation of the Immigration Act of Ferbuary 5, 1917, for the following *among other* (italics ours) reasons: That she has been found managing a house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes." In other words, it would appear that there were "other reasons" (which were not disclosed to appellant) for her arrest and trial besides those assigned by the warrant. This is positive proof of unfairness and misuse of authority.

The evident purpose of including "among other reasons" in the warrant was to make it so broad that regardless of what developed at the hearing or otherwise, if it served the immigration authorities, it could be used against the appellant. Although appellant was not specifically charged with what she may have done in Alaska, nevertheless the presiding inspector in his summary of the hearing at San Francisco felt that the "among other reasons" clause of the warrant justified him in basing his recommendation for deportation in part, at least, on the alleged admission of the appellant that she had "sported" in Alaska. It will be noted that the examining inspector's summary states (Exhibit A, p. 11): "A sworn statement was taken from the alien in which she admitted she had practiced prostitution in Alaska." Similarly the Washington Board of Review, under this "other reasons" clause, based its recommendation for deportation in part on this alleged admission of appellant. The Board's opinion in this regard reads (Exhibit A, p. 20): "The alien admitted in the preliminary statement having practised prostitution in Alaska for a few months some years ago."

In both of these instances it was deemed necessary to include in the findings specific reference to this alleged admission of appellant in order to justify the respective recommendations for deportation. This alleged admission was foreign to the issue unless it may be deemed that the "other reasons" clause gave justification to use appellant's alleged admission as a supporting basis for the respective recommendations for deportation.

In other words, the appellant was ostensibly tried on the specific charges in the warrant, but that the findings for her deportation were based in part upon matter that was foreign and extraneous to the issue.

It is fundamental that an alien can only be ordered deported on a specific charge against him.

Ex parte Nogata, 11 Fed. (2d) 178;

Ex parte Thorvumulopalo v. U. S., 3 Fed. (2d) 803.

In *Whitfield v. Hanges*, supra, 222 Fed. 745, at page 749, the court says:

> "The accused shall be notified of the nature of the charge against him in time to meet it * * * that the decision shall be governed by and based upon the evidence at the hearing and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it."

In *Ex parte Keisuki Sata*, 215 Fed. 173, at page 177, the court says:

> "It is quite true that an alien arrested on one charge may be deported for any reason which may develop in the course of the proceedings, but before this can be done he must be advised of the new charge or charges, and be given an opportunity to meet them."

The court, in this last cited case, further on in its opinion at page 177 gives the reason for this rule that an alien may not be tried on one charge and deported on another, saying:

> "So that he may not be lulled into a fancied security that he is being examined on one charge when it is really intended to order his deportation upon another."

For the immigration authorities to have legally used appellant's alleged admission of what she had done in Alaska some thirteen years ago it would have been necessary for them to have amended the warrant so as to make it one of the specific charges against the alien. Not having done this, the appellant, of course, had no grounds to assume that this matter would be used as one of the reasons for finding against her.

(2) At the hearing the presiding inspector introduced into the record a letter signed by inspectors Phelan and Farrelly on February 26th, 1927, together with a statement taken from appellant on the same date (Exhibit A, p. 16), whereas the record now discloses papers of similar import, but bearing different date, to-wit, the letter of inspectors in the record bears the date of February 25th (Exhibit A, p. 5) and the statement alleged to have been taken from the appellant (Exhibit A, p. 4) is shown by the statement of the record to have been taken on February 25th. While appellant does not desire to stress this particular point, the record clearly shows that in addition to the examining inspector specifying February 26th on which the letter was written and the statement made, that the appellant testified that she made her statement on February 26th, 1927 (Exhibit A, p. 16). It is true that appellant's attorney did refer to the letter being written and a statement being made on February 25th, but the only evidence of probative force in reference to the matter is that February 26th, 1927, is the correct date for both papers. Hence

legally neither of these papers have any place in the record under the authority of

Kwock Jan Fat v. White, 253 U. S. 454; and
Ex parte Avakian, 188 Fed. 688.

(3) The examining inspector evidently felt it necessary in setting forth the basis for his recommendation for deportation (Exhibit A, p. 11) to use the alleged admission that appellant had "sported" in Alaska. It is submitted that this matter not having been made by the warrant a charge against appellant, and therefore not within the issues, should not have been used and that using it was unfair and a manifest abuse of authority.

(4) The Washington Board of Review in its recommendation (Exhibit A, p. 20) for deportation likewise deemed it necessary to use the alleged admission of appellant that she had "sported" in Alaska, which, as heretofore pointed out, was not within the issues; therefore, the use of it in the opinion supporting deportation was unfair and a clear abuse of authority. Furthermore, the Board in its opinion (Exhibit A, p. 20) made a false finding that "the alien admitted in the preliminary statement * * * that at the time of her arrest in the proceedings she had a girl practicing prostitution in her house". There is no such admission by the appellant to be found anywhere in the record and to make such an untruthful finding was unfair and abusive of authority. It is elementary that a judicial or quasi judicial officer shall not base an opinion or decision upon matter that is not within the issue, and particularly that he shall not

make a decision based on an untrue finding. This was clearly done by the Board of Review in this case.

As the court said in *Whitfield v. Hanges,* 222 Fed. 745, at page 749:

> "The decision shall be governed by and based upon the evidence at the hearing, and that only."

CONCLUSION.

It is submitted that the appellant did not have a fair hearing because there is no substantial legal evidence in the record to sustain the charges against her and further that the proceedings were manifestly unfair and that there was a manifest abuse of authority committed to the immigration authorities.

While counsel for appellant believes that the contentions made are amply supported, nevertheless it is desired that the court also consider the serious consequences to appellant if she is deported to Italy, which country she has been away from for more than twenty-five years. She has one daughter and grandchild and relatives in the United States and all of her interests are here. Having lost her residence in Canada by having resided here since 1919, she cannot be deported to British Columbia, where one of her daughters resides. Italy, the country which the order of deportation directs that she be deported to, is indeed a foreign country to her, on account of her long absence therefrom.

As Judge Dietrich of this Circuit has said in *Ex parte Garcia,* 205 Fed. 56-57:

> "I am frank to say that in a case of this kind, where the petitioner has been domiciled in this country for more than a decade, and may have acquired large property interests and formed close social ties, and where, therefore, deportation is fraught with such dire consequence to him, to subject his right to remain here to a trial by ex parte affidavits is so far out of harmony with the procedure which I think ought to prevail that I would be inclined upon slight evidence of bad faith on the part of the administrative officers, to grant relief."

It is finally submitted that appellant is entitled to a release or at least is entitled to have the issues of this case tried *de novo* as outlined in *Whitfield v. Hanges,* 222 Fed. 754.

Dated, San Francisco,
June 16, 1928.

Respectfully submitted,

JULIAN D. BREWER,
Attorney for Appellant.